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No. 84-1250

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JERRY RAY MESSER,
Petitioner,

vs.

THE STATE OF KANSAS,
Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Kansas

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether or not the defendant was denied his Sixth Amendment Right of Compulsory Process when the Court refused to allow the defendant to present evidence that he had been previously misidentified for another man who is his "Look Alike" or "Double" who had committed a somewhat similar crime the very next day after this crime occurred in the same area.

2. Whether or not the physical lineup in this case was deficient because of the following factors: (1) the lineup contained only two men besides the defendant, neither of whom fit the description of the individual who committed the crime, (2) the witnesses sat together in the lineup room during the lineup at the same table, (3) there was some evidence of conversation between the witnesses during the lineup, (4) prior to the lineup the victim was told by a detective that the individual who attacked her was under arrest, had a previous criminal record, and that there would be other individuals at the lineup to identify him.

3. Whether or not polygraph evidence should be admissible or at least whether or not the trial court should conduct a hearing in relation to polygraph evidence submitted by the defendant.

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PETITIONER'S RESPONSE IN QUESTION NUMBER ONE

The respondent's brief quoted the Kansas Supreme Court Opinion which noted "the descriptions of the perpetrators of the criminal acts of the two incidents varied in some important particulars." As can be seen from the charts included in the petitioner's Writ of Certiorari, the descriptions given by the witnesses in the two cases were uncannily similar. The petitioner has no idea why the Kansas Supreme Court made the statement it did about the descriptions. It was that statement that prompted the petitioner to file a motion for rehearing in the Kansas Supreme Court which was denied. It was never contended by the prosecution in this case that there were any material differences in the descriptions referred to by the Kansas Supreme Court. Except for some minor variances in the opinions of the witnesses as to the age of the man they saw, there were no material differences in their descriptions.

The public defender in the Topsy's case, after viewing the video tape of the Topsy's robbery, believed that the petitioner, Messer, was the man in the video tape. It was not until several frames were blown up that the public defender then realized that a mistaken identity had occurred and that the petitioner, Messer, was not the man in the video tape. That is how much the petitioner, Jerry Messer, looks like the Topsy's robber. The victim, in the Topsy's case, after being told that she was mistaken, said about the petitioner, Messer, "he must have a twin."

The trial judge in this case, The Honorable Robert Jones, compared photographs of the Topsy's robber with photographs of the petitioner, Messer, and commented "he certainly looks like the person who committed another robbery." The Judge also said, "I am inclined—the photographs do show that there is another person that resembles him." The Judge later called it a "strong resemblance." The Judge, however, then went on to rule that evidence of the Topsy's robbery and the misidentification of the petitioner therein was not admissable. His rationale was that the Topsy's robbery involved no violence and the Albertson's antique store incident did involve violence. It is important to note, however, that in the Topsy's case the victim cooperated. In the Albertson's case the victim did not cooperate. It does not appear in the Albertson's case that the violence was planned. It seems only logical to conclude that if the victim in the Albertson's case had cooperated, there may very well not have been any violence.

Whether or not it is proper to admit evidence that another individual committed a crime with which a defendant is charged, is a difficult question. However, one of the fundamental rights of a defendant in a criminal case is the defendant's right to call witnesses in his favor to show his innocence. When relevant, reliable evidence exists to show that someone else committed the crime,

such evidence must come in to protect defendants who are actually innocent.

PETITIONER'S RESPONSE IN QUESTION NUMBER TWO

The respondent contends that the petitioner did not raise a federal question with regards to the physical lineup. The petitioner cited the Fourteenth Amendment when setting out the Constitutional and Statutory Provisions Involved. It is perhaps elementary that the Due Process Clause of the Fifth and Fourteenth Amendments forbids an identification procedure which is unnecessarily suggestive. *Stovall vs. Denno*, 388 U.S. 293 (1967).

PETITIONER'S RESPONSE IN QUESTION NUMBER THREE

The respondent again contends that no federal question is involved with regards to the polygraph issue. In this case, the petitioner was denied the right to call a highly skilled polygraph examiner to present overwhelming polygraph evidence that the petitioner is actually innocent. The refusal of the trial court to allow the polygraph evidence denied the petitioner his Sixth Amendment Right to present evidence or witnesses in his behalf. Additionally, the fact that other defendants in other criminal cases have been able to avail themselves of this type of evidence is a violation of the Equal Protection Clause of the Fourteenth Amendment.

CONCLUSION

For these reasons, as well as the reasons set out in petitioner's Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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